

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION )  
OPIATE LITIGATION ) Case No. 1:17MD2804  
Track 1B Cases )

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TRANSCRIPT OF PROCEEDINGS VIA TELECONFERENCE  
BEFORE THE HONORABLE JUDGE DAN A. POLSTER, JUDGE  
OF SAID COURT, ON TUESDAY, APRIL 28TH, 2020,  
COMMENCING AT 2:30 O'CLOCK P.M.

- - - - -

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1                   P R O C E E D I N G S

2                   MS. RUCKI: Hi Everyone. This is Molly.

3                   I am going to start checking folks in using  
4 first names if that's easier.

5                   Starting with the Plaintiff and for Cuyahoga  
6 County, we do have Hunter?

7                   (No response.)

8                   MS. RUCKI: Salvatore?

9                   MR. BADALA: Yes. Good afternoon.

10                  MS. RUCKI: Frank?

11                  MR. GALLUCCI: Yes. Yes, good afternoon.

12                  MS. RUCKI: Brendan.

13                  (No response.)

14                  MS. RUCKI: Greg? Do we have Deborah from  
15 Summit? Or Linda?

16                  MS. SINGER: Linda is here.

17                  MS. RUCKI: Donald? Do we have Mark? All  
18 right.

19                  For Defendants, Walgreens first.

20                  MR. SHKOLNIK: I'm sorry, Hunter Shkolnik is  
21 here. I didn't hear.

22                  MS. RUCKI: Okay. Thanks.

23                  MR. WEINBERGER: And Pete Weinberger is on.

24                  MR. MIGLIORI: And Don Migliori for Summit.

25                  MR. RICE: And Joe Rice is on.

1 MS. RUCKI: Okay.

2 MR. FARRELL: And Paul Farrell.

3 MR. LANIER: And Mark Lanier and Paul

4 Stanley.

5 MR. RAFFERTY: And Troy Rafferty.

6 MS. RUCKI: All right. Back to Defendants.

7 Kaspar.

8 MR. STOFFELMAYR: Yes, I am on.

9 MS. RUCKI: Michael Freeman?

10 MR. FREEMAN: Here.

11 MS. SWIFT: And Kate Swift is on as well. I  
12 didn't hear you call my name. Apologies.

13 MS. RUCKI: For CVS, we have Eric?

14 MR. DELINSKY: Yes, I'm here. Sasha.

15 MS. MILLER: Yes, I'm here.

16 MS. RUCKI: Graeme.

17 MR. BUSH: Here.

18 THE COURT: All right. Dan Polster calling  
19 in.

20 MS. RUCKI: Hi, Judge. I am just checking  
21 everyone in to make sure everyone is here.

22 From CVS, we have Elizabeth?

23 MS. FERGUSON: Yes, I'm sorry.

24 MS. RUCKI: Giant Eagle, Robert?

25 MR. BARNES: Here.

1 MS. RUCKI: Josh?

2 (No response) .

3 MS. RUCKI: Do we have David Ross.

4 MR. ROSS: Yes, I'm here.

5 MS. RUCKI: Drug Mart, Tim and Tom?

6 MR. McCONNELL: Tom is here.

7 MR. JOHNSON: I'm here.

8 MS. RUCKI: For Rite Aid, we have Kelly.

9 MS. MOORE: Yes.

10 MS. RUCKI: John Lavelle.

11 MR. LaVELLE: John Lavelle is here, yes.

12 MS. RUCKI: Greg.

13 MR. FOUTS: Yes, here.

14 MS. RUCKI: Ron.

15 MR. CHIMA: Yes, here.

16 MS. RUCKI: Okay. For Wal-Mart, we have

17 Tina.

18 MS. TABACCHI: Yes.

19 MS. RUCKI: Tara.

20 MS. FUMERTON: Yes.

21 MS. RUCKI: And Kerri.

22 MS. RUTTENBERG: Yes.

23 MS. RUCKI: Do we have the court reporter?

24 COURT REPORTER: Yes, I'm here. George.

25 MS. RUCKI: Okay.

1 MS. MATZ: Deb Matz.

2 MS. RUCKI: Thank you.

3 MR. KORBIN: Josh Korbin.

4 MS. RUCKI: David Cohen, are you there?

5 (Pause.)

6 SPECIAL MASTER COHEN: Hi, Molly. Sorry, I  
7 am here.

8 MS. RUCKI: Great. All right, Judge, seems  
9 like we have everyone.

10 THE COURT: All right. Is Judge Ruiz on?

11 MS. RUCKI: Yes, he is here.

12 MAGISTRATE JUDGE RUIZ: Yes, I am.

13 THE COURT: All right. This is MDL 2804,  
14 the opioid MDL, particularly the case against the  
15 pharmacies, Track 1B.

16 The Court has reviewed the various filings  
17 that have come in over the last few days. I want to say  
18 this at the outset: It was my plan and intent to have  
19 one pharmacy bellwether trial.

20 It makes sense to the MDL Judge to be the  
21 one who conducts the first bellwether trial. I had set  
22 one for the pharmacies, Track 1B, Summit and Cuyahoga  
23 County as the Plaintiffs.

24 I knew it was somewhat unusual to allow  
25 complaints to be amended to add dispensing claims, but I

1 thought it was far more efficient for the Plaintiffs,  
2 certainly the Defendants, and the Court to have one  
3 bellwether case against the pharmacies, having all of the  
4 claims, distributing claims and dispensing claims.

5 Pharmacies filed a Mandamus action that the  
6 Court of Appeals ruled that it was wrong for me to allow  
7 the belated -- amending the claims to add -- amending the  
8 complaints to add the dispensing claims.

9 But the pharmacies should have realized that  
10 what they were doing was giving that decision to the  
11 Plaintiffs, whether or not to go forward with Track 1B  
12 with the distribution claims alone or to just drop the  
13 distribution claims and ask the Court to set a bellwether  
14 trial with everything. Plaintiff opted to go forward  
15 with the distribution claims alone.

16 So that's what we are going to try in  
17 November, but the pharmacies should have realized that I  
18 was going to set a bellwether case involving the  
19 dispensing claims, and I can only set a bellwether case  
20 in the Northern District of Ohio.

21 So that's why I suggested that the parties  
22 confer and see if they could come up with one.

23 The Plaintiff had suggested Lake County and  
24 Trumbull County, counties. They seemed as good as any to  
25 me, but I don't really care. If the Defendants thought

1 that some other counties in the Northern District would  
2 be better, I would certainly listen to them.

3 The Defendants had suggested a county in  
4 Georgia, and they are not waiving Lexicon, so obviously,  
5 I couldn't do that. I can't try a case in Georgia  
6 without the parties' consent. I can only try a case in  
7 the Northern District of Ohio.

8 So we will just try Trumbull County and Lake  
9 County, and the Defendants objected to my structuring the  
10 case. I didn't structure the case. The case was already  
11 structured against the pharmacies and public nuisance  
12 alone.

13 So I said, well, we will do the same thing.  
14 So that's what we will do. We will end up with two  
15 bellwether trials. November of 2020 will be the  
16 distribution claims alone, Plaintiff Summit County,  
17 Cuyahoga County, and in May of 2021, we will have  
18 Lake County and Trumbull counties against the same  
19 pharmacies, and we will have distribution claims and  
20 dispensing claims.

21 So I am going to direct the parties to meet  
22 and confer and come up with a litigating schedule. You  
23 can use the model of Track 1B, which I had given people a  
24 year in advance to do, so you can pretty much plug in the  
25 dates. We will have a four-week trial in May of 2021

1 unless, of course, the parties use the opportunity  
2 between now and then to work out some settlement, which I  
3 have encouraged, and while we are on that subject, have  
4 you had any conversation with the private mediator that  
5 you selected? I am not asking for any details. I just  
6 want to know whether you met with him virtually.

7 MR. STOFFELMAYR: Judge, it is Kaspar  
8 Stoffelmayr for the Defendants, and the parties have met  
9 with Judge Gandhi, both together and independently at  
10 this point a number of times.

11 THE COURT: Okay, good. Again, I just want  
12 to make sure you were underway. Judge Gandhi has an  
13 excellent reputation. I think if all sides really  
14 want to reach a settlement, you can do it under his  
15 direction.

16 Okay. Now, we have to figure out Track 1B,  
17 and I have read the parties' filings. It is not -- the  
18 Court isn't going to decide how the Plaintiffs try their  
19 case or the Defendants try their case, but how you  
20 respectively try your case will influence what documents  
21 are admissible.

22 Let me start out with the Plaintiffs. All  
23 right. This is distribution claims only. How will you  
24 -- how are you trying your case? What's your evidence  
25 going to be?



1 MR. WEINBERGER: Your Honor, this is Pete  
2 Weinberger for the Plaintiffs.

3 The distribution case will be tried  
4 principally on whether or not the Defendants had adequate  
5 SOM systems in place, and with respect to the SOM systems  
6 they did have in place, whether or not they correctly  
7 used them or in total whether or not they violated the  
8 Controlled Substances Act by failing to properly use  
9 systems that should have identified suspicious orders and  
10 halt that shipment.

11 Now, unlike the Big Three distribution case,  
12 these pharmacy Defendants as both distributors and retail  
13 dispensers had -- were able to see from the dispensing  
14 side how a particular store or in what quantities or in  
15 what -- and what methodology they were dispensing these  
16 opioids, what we have commonly now referred to as a  
17 red-flag system.

18 And so in order to make decisions about the  
19 quantities of opioids to distribute to their own stores,  
20 we believe that they had an obligation, indeed, a duty to  
21 look at what were the dispensing practices or levels of  
22 opioids being dispensed at the store level.

23 And so it was our belief and going back to a  
24 year-and-a-half ago that dispensing policies and  
25 potentially dispensing data, that they would have had

1 available to look at at the time they were making  
2 decisions to distribute to themselves, was important, and  
3 it is important to this case.

4 Now, having said that, as you know, your  
5 Honor, we took -- we have taken the position that if the  
6 Defendants' position is that dispensing information and  
7 policies are not relevant to their obligations as  
8 distributors and are prepared not to utilize dispensing  
9 policies or data to defend themselves, then we are  
10 prepared to try the case as if they were simply a  
11 distributors case and not a pharmacy distributor, who  
12 also had obligations as dispensers. So let me just stop  
13 there.

14 THE COURT: All right.

15 MR. WEINBERGER: And before I conclude, if  
16 any member of my team, our team who is on this call,  
17 wants to add anything, I am happy to stop and let them  
18 add.

19 MR. SHKOLNIK: Nothing from Cuyahoga.

20 MR. MIGLIORI: It was well said.

21 MR. FARRELL: This is Paul Farrell. The  
22 only thing I would add is the actual data from the  
23 pharmacies that CVS, for instance, was distributing, the  
24 data that is available theoretically could be a component  
25 of the due diligence file.

1                   And so Pete's point is an emphasis for us  
2                   that if we are going to draw a line, then what's good for  
3                   the goose is good for the gander.

4                   THE COURT: Well, obviously. But Paul, that  
5                   data was produced last year in 2019 as part of an issue  
6                   of discovery for Track 1B when it was just distribution  
7                   claims against the pharmacies, correct?

8                   MR. WEINBERGER: Your Honor, this is Pete.  
9                   No, not completely.

10                  There were dispensing policies that were  
11                  produced, and there were reports of due diligence that  
12                  were produced. So what I am saying is compilations, but  
13                  the data itself, we never had the data, the prescription  
14                  data, dispensing data until it was produced about six  
15                  weeks ago.

16                  THE COURT: All right. And we only had that  
17                  because we were at that time proceeding as Track 1B  
18                  having distribution and dispensing claims.

19                  MR. WEINBERGER: That is true, your Honor.

20                  And I believe in a discovery order from  
21                  Special Master Cohen, which is discovery order 8, he made  
22                  a decision on proportionality and was looking also at the  
23                  timing of the discovery schedule and ruled that at that  
24                  time, that we could not get -- we could get the policies,  
25                  and we could get due diligence files, but we couldn't get

1 the dispensing data, but that the Defendants had an  
2 obligation to preserve the data, and that the data might  
3 become available to us in discovery post CT 1A.

4 THE COURT: All right. How are  
5 the Defendants planning to defend this case in  
6 November?

7 MR. DELINSKY: Good afternoon, your Honor.  
8 It is Eric Delinsky on behalf of CVS, and I will speak  
9 for the pharmacy Defendants on this issue.

10 The short answer to your question is that we  
11 are going to defend our respective clients at trial based  
12 on the discovery record as it existed at the time we were  
13 severed. That may require a little explanation, your  
14 Honor, but I think the parties were generally severed.

15 Most of us were severed in and around August  
16 of 2019 prior to the Track 1A trial in October, and  
17 Walgreens, of course, was severed right after the  
18 settlement was reached after jury was selected before  
19 opening statements.

20 And we are going to use the discovery record  
21 as it existed at the time of the severance to defend our  
22 clients. That will include witnesses on the distribution  
23 side of our respective businesses, expert witnesses,  
24 third-party witnesses, of course, witnesses Plaintiff --  
25 representatives of the Plaintiffs.

1                   And to a degree, your Honor, it also will  
2 include some what we can call dispensing-related  
3 information.

4                   And just to step back, as Pete referenced a  
5 year-and-a-half ago in October of 2018, we have been at  
6 this that long, Special Master Cohen addressed the  
7 question about what degree of dispensing information is  
8 appropriate for a distribution only case, specifically in  
9 the context of Track 1A.

10                  And Special Master Cohen determined that it  
11 was appropriate, indeed, necessary that the pharmacy  
12 Defendants produce several buckets of dispensing  
13 information.

14                  So for instance, we were ordered to produce,  
15 and we did produce dispensing data contained in our SOM  
16 due diligence file. That was produced. We were ordered  
17 to produce, and we did produce our dispensing policies  
18 and procedures.

19                  We were ordered to produce, and we did  
20 produce 30(b) (6) witnesses able to testify on dispensing  
21 policies and procedures.

22                  We were ordered to produce, and we did  
23 produce compensation policies for our pharmacists. We,  
24 of course, produced all the orders that our pharmacists  
25 placed to our distribution center.

1           Your Honor, we call that distribution data,  
2 but what that distribution data encapsulates are our  
3 orders placed by our pharmacies that the distribution  
4 centers fulfill. That was produced in the case.

5           And as we went down this course in Track 1A  
6 in the distribution case and in the wake of discovery  
7 ruling No. 8 entered by Special Master Cohen, many of us  
8 also disclosed witnesses who could testify about the  
9 policies and procedures and pharmacists who could testify  
10 about relevant issues.

11           All that discovery, your Honor, was provided  
12 long ago, twelve months ago, eighteen months ago, all in  
13 the context of Track 1A, all in service of Special Master  
14 Cohen's order, all in service of the Track 1A  
15 distribution trial.

16           And had we gone to trial, had we not been  
17 severed, that evidence would be available to Plaintiff.  
18 It would be available to us. And our position is that's  
19 where we are today, just as we were at the time of  
20 severance, and that that same status quo should pertain.

21           To the extent Plaintiffs object or the  
22 concern that we may use an entirely new bucket of  
23 discovery that was produced since the amendments by  
24 interlineation since Track 1B commenced over the course  
25 of the last several months, we are not going to use that

1 information.

2 We agree with Plaintiff that that  
3 information, which includes prescription-by-prescription  
4 dispensing data, is not available for use in this case.  
5 But we do -- our position is that all the discovery  
6 material and disclosures made in the course of the  
7 Track 1A distribution case should be available to us, is  
8 available to Plaintiff. Plaintiffs state in their  
9 position paper that they believe it is available to them,  
10 and certainly, if it is available to them, it is  
11 available to us, too.

12 THE COURT: All right. Well, I think  
13 everyone agrees with that, Mr. Delinsky. If it was  
14 produced last year and would have been used in the trial,  
15 1A, it is available for 1B.

16 MR. WEINBERGER: Your Honor, this is Pete.  
17 Can I respond for a moment?

18 THE COURT: Yes.

19 MR. WEINBERGER: So in the leadup to the  
20 trial, Walgreens for one identified a number of  
21 pharmacists who they indicated they were going to call as  
22 witnesses, who had not been deposed.

23 So the context in which Mr. Delinsky talks  
24 about orders by the pharmacists that they are going to  
25 put into evidence orders by a pharmacist from a

1 particular store to the CVS distribution center using CVS  
2 as an example, presumably per their policies -- and  
3 frankly, per the testimony of witnesses that were  
4 deposed -- that pharmacist had an obligation to look at  
5 the dispensing data to identify whether or not there were  
6 prescriptions that potentially raised red flags in order  
7 to properly place the orders for drugs to be distributed  
8 to the local pharmacy.

9 So you can't separate what Mr. Delinsky  
10 describes as distribution data, which he described as the  
11 order by the pharmacist as distribution data, and  
12 separate out the fact that what the pharmacist had to be  
13 relying on or should have been relying on was information  
14 at the store level in terms of how and to what extent  
15 these opioids were being dispensed.

16 And you know clearly we did not have the  
17 data; we had what they describe as due diligence files  
18 looking at the data.

19 Well, until we got the data, we were unable  
20 to test whether or not the due diligence files were  
21 complete. So they can -- what I'm hearing Mr. Delinsky  
22 say is, well, we produced the due diligence files, which  
23 is a compilation of the data that a pharmacist may have  
24 looked at to justify an order of distribution to that  
25 store, but we are unable to test whether or not that due



1 diligence was done appropriately, and that's, frankly,  
2 your Honor, where the rubber meets the road here.

3 THE COURT: All right. Look, Mr. Delinsky,  
4 are you planning to call individual pharmacists to  
5 testify, and if so, what are they going to say? What is  
6 the purpose of their testimony?

7 MR. DELINSKY: We may call pharmacists, your  
8 Honor, and their testimony would be limited to the  
9 material that has been the subject of discovery in  
10 Track 1A. It would be about ordering, placing orders to  
11 wholesale pharmacies. It would be about the policies  
12 that have been produced, all of which were produced long  
13 ago in Track 1A.

14 THE COURT: Well, what about -- I mean, is a  
15 given pharmacist really going to say that he didn't look  
16 at his own dispensing data and records in deciding how  
17 much to order?

18 MR. DELINSKY: Your Honor, what  
19 Mr. Weinberger has raised frankly is, you know, are  
20 fact accusations that aren't supported. There isn't a  
21 problem --

22 THE COURT: I would like -- can you answer  
23 my question?

24 All right. You call a pharmacist to testify  
25 about wholesale orders, orders, policies, et cetera. Is

1 he going to say that he placed -- he or she --  
2 placed orders without examining his own dispensing  
3 records?

4 MR. DELINSKY: Your Honor, in the context of  
5 dispensing records, it can really be broken down in two  
6 ways: There is inventory and what is an appropriate  
7 till, appropriate quantity of a particular medicine to  
8 maintain on the shelf, so it is available to fill  
9 prescriptions for patients who need them. That's one way  
10 of looking at the data.

11 The other is what is posited by  
12 Mr. Weinberger, that pharmacists in Plaintiffs' view  
13 would undertake some, quote unquote, red flag review of  
14 the prescriptions in the course of placing their orders.  
15 We do not plan to present evidence of the latter nor do  
16 we think, frankly, that's a legal requirement in any  
17 respect.

18 THE COURT: All right.

19 MR. WEINBERGER: Your Honor, I can't just  
20 sit silently.

21 I mean, this is splitting hairs,  
22 inappropriately splitting hairs when, in fact, we have --  
23 we should have the right to -- I mean, the crux of the  
24 retail pharmacy distribution case is whether or not the  
25 orders that were placed and then filled was done

1 appropriately and in accordance with suspicious order  
2 monitoring, and the only way to test that is frankly to  
3 test whether or not the ordering employee exercised due  
4 diligence at the dispensing level.

5 Very frankly, it is not that different than  
6 our case against the Big Three because the Big Three also  
7 produced information that they were -- and questionnaires  
8 -- that they were issuing to a retail pharmacy like CVS  
9 when one of them was distributing an opioid to them,  
10 because they wanted to know what was the reason for the  
11 additional, let's say, thousand-pill quantity than the  
12 month before. And so CVS had to produce information as  
13 to why it was that they ordered more.

14 MR. DELINSKY: Your Honor, if I can --

15 THE COURT: This is exactly why I only  
16 wanted one trial because it has always been clear to me  
17 that for a pharmacy -- that their distribution policies  
18 are inextricably intertwined with your dispensing  
19 policies and practices, because you are only distributing  
20 to yourself, all right, as opposed to the Big Three  
21 distributors who distribute to -- they are not  
22 distributing to themselves; they are distributing to  
23 other entities.

24 You are only distributing to yourself. I am  
25 talking of the pharmacy. So I always questioned what was

1 the real difference between the dispensing claim and a  
2 distribution claim, and that ultimately when we had this  
3 combined trial, I really thought it would focus on the  
4 dispensing claim.

5 The red flags would be red flags that come  
6 up in dispensing from, you know, say a given patient, a  
7 given customer gets four prescriptions for opioids from  
8 four different CVS stores in the same month.

9 And candidly, I don't know how we are going  
10 to try the distribution claim only case. I can't tell  
11 the Plaintiffs how to do it; I can't tell the Defendants  
12 not to call pharmacists, but guess what?

13 You call the pharmacist at 55th and Euclid,  
14 I don't see how I can allow that without ordering you to  
15 produce the dispensing records for the 55th and Euclid  
16 pharmacy, so the Plaintiff can test the credibility of  
17 the statements the pharmacist is making.

18 Now, if we don't have any pharmacists  
19 testifying, maybe not, but I don't -- you know, I don't  
20 -- unless someone can clearly tell me how a distribution  
21 claim against a pharmacy is separate and distinct from a  
22 dispensing claim -- we are talking about whether or not  
23 they caused a public nuisance -- I don't see how we break  
24 -- how we have a distribution practice case only.

25 MR. DELINSKY: Your Honor, the solution to

1 your dilemma would be to put Track 1B back in the MDL --  
2 back in the bucket of state cases and to proceed with  
3 another bellwether that has bells. That is the solution,  
4 the dilemma you outlined.

5 But if we are not going to do that, I do  
6 think it is important to direct your attention to a few  
7 of the facts we are dealing with and some of the  
8 ramifications. We began disclosing pharmacists as  
9 potential witnesses with relevant information in Track 1A  
10 going back two years, June of 2018 as a category.

11 And we progressively got more granular  
12 providing names. This is all in Track 1A. Never were  
13 these issues raised with the exception of the litigation  
14 before Special Master Cohen where he ruled on the issues.  
15 Now well on the case, he struck the balance. That's the  
16 balance that we have to live with in this case now. It  
17 is the balance that does not fall to sensing data.

18 THE COURT: Look, I don't see how we try  
19 this case in November on distribution only without it  
20 morphing into dispensing on both sides. And I am not  
21 going to tie -- I am going to have the same ground rules  
22 for both, but can someone tell me -- how can a pharmacy  
23 -- can you have a suspicious order monitoring system that  
24 doesn't look at dispensing data? Is that possible when  
25 all you are doing is distributing to yourself?

1                   That's my question.

2                   MR. DELINSKY: Absolutely, your Honor.

3                   THE COURT: How? All right. How can your  
4 SOM -- how can your SOM not require someone to look at  
5 the dispensing practices of your pharmacies.

6                   MR. DELINSKY: The answer is provided in the  
7 regulation. The SOM regulation calls upon the  
8 registrant, in this instance the distributor, to put in  
9 place a system to identify suspicious orders defined to  
10 be orders of unusual size, orders of unusual frequency or  
11 orders of an unusual pattern.

12                   It is an order-based analysis. That's what  
13 the statute calls for, and that's how a SOM system can be  
14 run without reference to dispensing data, and indeed,  
15 that's often how it is run when you are not dealing with  
16 self-distributors; you are dealing with wholesale  
17 distributors; don't have their own pharmacies; shipping  
18 to other pharmacies, and they don't always and frequently  
19 don't have the dispensing data.

20                   That's not to say it is not used. It hasn't  
21 been used where it is in the due diligence file. We have  
22 all produced it, but that's the answer to your question.  
23 It is an order-based analysis.

24                   The regulations require an evaluation based  
25 on the size, pattern, frequency of the order. It does

1 not call on the registrant to go to the dispensing  
2 data.

3 THE COURT: Well, let me follow up on that.

4 Okay. If the SOM is supposed to -- what we  
5 will call red flags of orders, unusual size, frequency,  
6 or pattern, so if you get an order that seems of unusual  
7 size, frequency, or pattern -- again, this is from one of  
8 your own stores -- then, you would be required to  
9 exercise due diligence, go to the store, talk to the  
10 people, ask them questions, and.

11 The questions and follow-up and due  
12 diligence would almost certainly require probing the  
13 dispensing practices of that store, right?

14 MR. DELINSKY: Possibly. But we have  
15 produced the due diligence materials from our files. So  
16 to the extent that there was a resort to dispensing  
17 information into the files, it has been produced.

18 MR. WEINBERGER: Your Honor, unless you have  
19 another question --

20 THE COURT: Well, let me keep going with  
21 this.

22 MR. WEINBERGER: Okay.

23 THE COURT: Then why -- are the Plaintiffs  
24 planning to call any pharmacists in your case in chief?  
25 What I am saying, pharmacist employees of the Defendant.

1 MR. LANIER: Your Honor, Mark Lanier. No,  
2 we are not.

3 THE COURT: Okay.

4 MR. DELINSKY: But your Honor, Plaintiffs  
5 are calling experts who single out particular pharmacies  
6 as suspicious.

7 THE COURT: Understood. But I am talking  
8 about pharmacists who worked at Rite Aid, CVS, Walgreens,  
9 Wal-Mart during the period, so the answer is no. All  
10 right.

11 Then Mr. Delinsky, what are you planning to  
12 have your pharmacists testify about?

13 MR. DELINSKY: Our pharmacists will testify  
14 about particular circumstances relating to their pharmacy  
15 that could explain large orders, for instance, if it is  
16 next to a hospital.

17 Pharmacists can testify about why and how  
18 they place orders. Pharmacists could testify about  
19 policies and procedures produced in the case.  
20 Pharmacists will not testify about the particular  
21 prescription.

22 So everything we would have our pharmacists  
23 testify fit squarely within the four corners of the  
24 discovery that was taken and completed in the Track 1A  
25 distribution case.



1                   And your Honor, if I could say one more word  
2                   about that, it would not be appropriate -- it would not  
3                   be permissible if Plaintiff were able to seek severance  
4                   on their own initiative. We didn't ask for it. They  
5                   sought it.

6                   They discontinued the trial from last  
7                   October to this November, and it would not be permissible  
8                   that the consequence of their voluntary act in seeking  
9                   severance had the effect of reformulating and reforming  
10                  discovery records.

11                  All that is going to trial is the  
12                  distribution case. The record in the distribution case  
13                  is closed. And that's where we are. And there is no  
14                  basis because of the failed amendment and their own  
15                  decision to amend or their own decision to severe off  
16                  for them to go back in time and re-do things that  
17                  they --

18                  THE COURT: Well, back in time, I don't have  
19                  a problem with individual pharmacists talking about how  
20                  they placed orders, policies, and procedures. All right.  
21                  But if they are getting into the circumstances of  
22                  particular orders and why they placed certain orders and  
23                  what they did and didn't do, I don't see how I can allow  
24                  that without permitting the Plaintiff to get to  
25                  dispensing data at the same time, during the same period

1 that is the subject of the testimony.

2 Again, I am not -- I'm not -- you are the  
3 one who said this is what you want these pharmacists to  
4 testify about, and I think -- the first thing, the first  
5 element you mentioned, I think, goes beyond prior  
6 discovery, opens the door to requiring the production of  
7 dispensing data.

8 And I don't want to go down that road. If  
9 we can clearly make this a SOM distribution claim case,  
10 we will try it in November. That's fine.

11 MR. DELINSKY: But your Honor, pharmacists  
12 don't consult dispensing data in placing orders, and they  
13 are not going to testify to that effect. They consult  
14 inventory data, but they don't do red flag analysis and  
15 consult dispensing data as it has become known in this  
16 case. It's just not how it works, and that's not what  
17 their testimony is going to be.

18 And Plaintiff, their core allegation from  
19 the time they amended us into the complaint in April of  
20 2018 has been that pharmacists placed suspicious orders.  
21 It has always been an accusation against pharmacists, the  
22 core. It has always been in the case.

23 It has never been a mystery that pharmacists  
24 are witnesses about whether -- you know, why they placed  
25 orders and how. We are not going to delve into the

1 particulars of any orders. No pharmacist remembers that,  
2 Judge. Remember we stopped --

3 THE COURT: No. You said that particular  
4 circumstances relating to a specific order like --

5 MR. DELINSKY: No, I'm sorry. I am sorry,  
6 your Honor. Let me -- I confused that. Let me restate  
7 that.

8 Certain pharmacies are criticized for an  
9 aggregate high volume, not one order or another. Okay.  
10 But Plaintiffs' experts say pharmacy A is a high volume  
11 pharmacy, and therefore, it is suspicious.

12 Well, if that pharmacy -- you know, we may  
13 call a pharmacist to say "yeah, we have a high volume.  
14 We are near four hospitals."

15 It is a matter of geography, not a matter  
16 of specific orders. That's certainly fair game,  
17 especially if Plaintiffs' experts are making the  
18 accusations.

19 THE COURT: All right.

20 MR. LANIER: Your Honor, Mark Lanier. If I  
21 could respond, please?

22 THE COURT: Yes.

23 MR. LANIER: This idea could only be brought  
24 forward by the Defendants as Mr. Delinsky is suggesting  
25 if it is part of the due diligence file. In other words,

1 the distributor has the responsibility of due diligence  
2 once a suspicious order has been identified.

3 So if they have got evidence that the  
4 distributor went to the pharmacy, did the due diligence,  
5 got the, quote unquote, testimony of the pharmacy that is  
6 going to be offered to the jury, that's one situation,  
7 but I think Mr. Delinsky is going to tell you that, as  
8 part of the due diligence, there is nothing in the file  
9 that indicates that there were records made of going to  
10 the pharmacy or doing the necessary research and finding  
11 out from the pharmacists this type of material.

12 So for him to put the witness on belies his  
13 entire argument of us being limited to suspicious order  
14 monitoring because he just stepped out of the due  
15 diligence rank and said I am not allowed to cross the guy  
16 on due diligence.

17 I am not allowed to say, "Okay. Maybe you  
18 are in the middle of four hospitals, but by the same  
19 token, these are prescriptions that were all being  
20 written by a gynecologist for men."

21 I mean, this isn't the kind of thing where  
22 he can have his cake and eat it, too.

23 THE COURT: Yeah, I agree with that,  
24 Mr. Delinsky. Let me just put it this way:

25 I will do this distribution-only claim

1 trial, but I don't see how -- I don't see how it is  
2 relevant or should be admissible that you put on  
3 pharmacists.

4 The only way you put on a pharmacist is if  
5 somehow that pharmacist's testimony is relevant to the  
6 due diligence.

7 Now, if you want to corroborate that the  
8 corporation did call the pharmacist at 55th and Euclid,  
9 you can put him on and say "yes, they did contact me, and  
10 this is what I said," but to put in new testimony, I  
11 think you are merging into, you know, turning this into a  
12 dispensing case.

13 MR. DELINSKY: That is not true, your Honor.  
14 That is not true. And what the Plaintiffs are doing,  
15 your Honor, is they are walking the Court into error  
16 again.

17 What they are saying is that everything  
18 about the case has to be evaluated by reference to their  
19 liability case, and that there is no other elements to  
20 the offense. There is not a causation element that is  
21 eligible for proof.

22 They are saying that they are allowed the  
23 present testimony singling out particular pharmacies, but  
24 we can't present counter evidence about those pharmacies.  
25 Okay.

1                   They are saying that, no --

2                   THE COURT: You want to put on evidence from  
3 your pharmacies, fine, but then you have got to give them  
4 the record of those pharmacies.

5                   MR. DELINSKY: But your Honor -- and that is  
6 -- they are asking for this data in complete and total  
7 violation of the mandate of the Sixth Circuit.

8                   Your Honor, we were prepared to go to trial  
9 in October. Plaintiff had raised none of these issues,  
10 not a one, other than as decided by Special Master Cohen  
11 in discovery ruling No. 8. This is using -- what they  
12 are doing now, your Honor, is they are using their  
13 request for a severance in which they pledged to us that  
14 severance would not prejudice us.

15                  THE COURT: Let me ask you: Have all the  
16 pharmacists that you designated as potential witnesses  
17 been deposed?

18                  MR. DELINSKY: No. Plaintiffs elected not  
19 to try to depose them.

20                  THE COURT: Well, they will be deposed now.  
21 That's the only way I can determine what testimony I am  
22 going to allow in the case.

23                  MR. DELINSKY: Well, your Honor, that's just  
24 giving them a re-do. That's reopening what has been  
25 closed. They had the opportunity to take that position

1 of the pharmacists.

2 We, as a matter of fact, put in a discovery  
3 response two months ago in discovery where we for a  
4 third time identified pharmacists as a category of  
5 witnesses, and we told them, if you want a sampling of  
6 names, tell us, and we will get them to you, and they  
7 didn't respond.

8 THE COURT: How many pharmacists are you  
9 planning to call? You have got four weeks. How many  
10 pharmacists -- I mean, you may have designated, I don't  
11 know, 50. How many are you really planning to call?

12 MR. DELINSKY: I believe we designated ten,  
13 your Honor.

14 THE COURT: And designated --

15 SPECIAL MASTER COHEN: I'm sorry, your  
16 Honor. This is David.

17 Is that just your client or ten as amongst  
18 all the pharmacy Defendants?

19 MR. DELINSKY: It is CVS, Special Master.

20 SPECIAL MASTER COHEN: So how many -- do you  
21 know how many total?

22 MR. DELINSKY: I don't, I'm sorry.

23 THE COURT: That could be 60 pharmacists.  
24 Obviously, Mr. Delinsky, we are not going to have 60  
25 pharmacists testify. It is inconceivable. All right.

1 It's the testimony by individual pharmacists that trouble  
2 the Court as to how we draw a line between a distribution  
3 case and a dispensing case. All right. And I --

4 (At this point, Judge Polster's phone  
5 connection was lost, and the following discussion was  
6 held out of the presence of the Court:)

7 MR. FARRELL: Judge Polster, this is Paul  
8 Farrell. Can I say one thing for the record?

9 MS. HUGHES: Sounds like he is not on, Paul.

10 MR. FARRELL: Well, it was going to be very  
11 important.

12 MS. HUGHES: Well, fine. Just a minute, and  
13 we will try to get him back.

14 (Long pause.)

15 SPECIAL MASTER COHEN: Mary, this is David.  
16 Can you hear me?

17 Thank you for taking the lead during this  
18 telecon. I just wanted to ask you because I don't  
19 remember when it was that the pharmacy Defendants were  
20 severed in Track 1A.

21 MR. DELINSKY: I think there were -- the  
22 five of us were severed -- I don't know the exact  
23 date --

24 THE COURT: All right. This is Judge  
25 Polster. I don't know what happened. Suddenly, I was



1 off. All right.

2 My question was: How long do the  
3 pharmacists want to identify -- the pharmacist witnesses  
4 you are really going to call and what they are going to  
5 say, can it be done in two weeks?

6 MS. HUGHES: Can everybody hear the Judge  
7 since he was disconnected?

8 THE COURT: Can you hear me? This isn't  
9 working. What's going on?

10 SPECIAL MASTER COHEN: Your connection I am  
11 sorry to say is not very clear, Judge.

12 THE COURT: Then, I guess we will have to do  
13 this in person. I don't know. What --

14 MS. HUGHES: Judge, why don't you hang up --

15 THE COURT: I did, I did. I called back in.  
16 I will do it one more time.

17 (Discussion continues out of the presence of  
18 the Court as follows:)

19 SPECIAL MASTER COHEN: I will take up where  
20 I left off, Eric. I didn't catch your answer.

21 MR. DELINSKY: Five of us were in August,  
22 Special Master. I can pull up the exact date. I can say  
23 it was around August 15th, 16th.

24 VOICE: I don't know if this helps, the  
25 order was issued on August 15th granting the severance.

1                   SPECIAL MASTER COHEN: Yeah, that's fine. I  
2 was just trying to remember where we were in discovery on  
3 the question of pharmacists because I know they had been  
4 named, but -- and it doesn't make sense to me to have  
5 depositions either before or during trial. And I think  
6 that it was headed towards something like that with the  
7 pharmacists.

8                   THE COURT: All right. I am back on one  
9 more time. Can people hear me now?

10                  MS. HUGHES: Perfect Judge.

11                  THE COURT: We are going to have to get this  
12 ending quickly because the technology is no good.

13                  How long do the pharmacists want to do what  
14 I just said?

15                  MR. DELINSKY: Can we please have 30 days,  
16 your Honor?

17                  THE COURT: All right. That's -- so  
18 that's --

19                  MS. HUGHES: Judge are you still on?

20                  SPECIAL MASTER COHEN: He must have a bad  
21 connection.

22                  (Judge Polster again was disconnected, and  
23 the following discussion was held:)

24                  MR. FARRELL: David, this is Paul Farrell.  
25 I need to make a proffer for the record to correct the

1 record on something that my good friend Mr. Delinsky  
2 said.

3 SPECIAL MASTER COHEN: Are you sure you need  
4 to do that, Paul?

5 MR. FARRELL: Given he has made reference to  
6 a waiver issue of the Plaintiffs taking the depositions  
7 of the pharmacists, I want to preserve somewhere on the  
8 record that we disagree with that position.

9 SPECIAL MASTER COHEN: Okay. All right.

10 MS. HUGHES: Can we do that now, David?

11 SPECIAL MASTER COHEN: Well, I think we just  
12 did.

13 Is there anything more you need to say other  
14 than what you just did, Paul?

15 MR. FARRELL: I always have more to say, but  
16 as long as the record is clear that we have a strong  
17 position that's inconsistent with that waiver argument,  
18 that's all I need.

19 SPECIAL MASTER COHEN: Okay. This really  
20 was the Judge's teleconference, and I am not going to  
21 take it over. I assume that he has gotten answers to  
22 questions that he needed to have answered, and if he  
23 didn't, we will follow up in e-mail.

24 So I appreciate everybody getting on the  
25 phone together. I hope you are all staying safe and

1 healthy. Be careful. Thank you very much.

2 (Teleconference concluded 3:45 p.m.)

3 - - - - -

4 C E R T I F I C A T E

5 I, George J. Staiduhar, Official Court  
6 Reporter in and for the United States District Court,  
7 for the Northern District of Ohio, Eastern Division,  
8 do hereby certify that the foregoing is a true  
9 and correct transcript of the proceedings herein.

10  
11  
12  
13 s/George J. Staiduhar  
14 George J. Staiduhar,  
Official Court Reporter

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